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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 1204

SAM G. MYERS,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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OCTOBER TERM, 1965

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SAM G. MYERS,
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vs.

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PETITION FOR A WRIT OF CERTIORARI

To THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

SAM G. MYERS herewith respectfully petitions this Honorable Court for a Writ of Certiorari to review of the judgment of the United States Court of Appeals for the Fifth Circuit which was rendered in this cause on February 14, 1966, affirming the conviction of Petitioner on three counts of individual and corporate income tax evasion.

OPINIONS BELOW

The District Court did not render an opinion as such but entered judgment based upon a jury verdict of conviction of three of four counts. The entry of its judg-

ment is copied in full in Appendix A, *infra*. The opinion of the Court of Appeals for the Fifth Circuit, comprising Appendix B, *infra*, is not yet officially reported. Its judgment is made a part hereof as Appendix C and the motion for rehearing was denied (Appendix D).

JURISDICTION

This matter involves the interpretation and application of substantive and procedural matters of Federal Criminal Law. The judgment of the Court of Appeals for the Fifth Circuit was entered on February 14, 1966. Rehearing was denied March 15, 1966. The jurisdiction of this Honorable Court is invoked under Section 1254 (1) of Title 28, United States Code.

THE QUESTIONS PRESENTED

Petitioner's Application for Certiorari presents the following questions of law:

I.

Did this Honorable Court's previous definition distinguishing between common law gifts and gifts within the meaning of the Tax Statutes apply in criminal proceedings and is a voluntary Court charge to the jury based thereon correct?[1]

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1. *Commissioner of Internal Revenue* v. *Duberstein*, 363 U.S. 278 (1960). Based thereon the District Court charged the Jury after it had returned to have three questions answered and without request from the jury or from either counsel defined a gift, inter alia, as follows: "A voluntarily executed transfer of his property by one to another, without any consideration or compensation, and therefore, though it might be a common law gift, it is not necessarily a gift within the meaning of the Tax Statute"?

The Court of Appeals for the Fifth Circuit held, without discussion, that this contention was devoid of merit.

II.

Did a District Court err in permitting a juror to make notes during the trial of the evidence after the same was called to his attention, even though the same is expressly not prohibited by Statute?[2]

The Court of Appeals for the Fifth Circuit, without any discussion, held that this contention was devoid of merit.

III.

Did the Trial Court err in not having oral hearing requested by Petitioner to determine contentions in motion and supplemental motions for new trial, supported by affidavit of a juror, involving misconduct of a material and substantial nature in discussing hearsay testimony not admitted by the Court?

The Court of Appeals for the Fifth Circuit, without discussion per curiam held this contention devoid of merit.

IV.

Does a summary which admittedly does not include all the evidence, or Petitioner's theories of the evidence, and which contains conclusions of the Government Agent preparing same, reflecting credibility of witnesses violate the Due Process provisions of the Fifth Amendment[3] and this

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2. 18 U.S.C. 1508.

3. The Fifth Amendment, U. S. Constitution provides, ". . . nor be deprived of life, liberty or property without due process of law. . .".

Court's decision in *Brady* v. *State of Maryland*[4] and deny Petitioner confrontation of the witnesses against him?[5]

The Court of Appeals for the Fifth Circuit holds:

> "Though the submission to the Jury in tax evasion cases, where the facts are often voluminous and complicated, of summaries of the evidence has often been approved . . . their preparation and use must be carefully handled by the Trial Judge. Having carefully examined the complained of summary, the evidence it purports to cover, and the Court's instructions accompanying its submission to the Jury, we find no impropriety in either the preparation or use here."

V.

Did the District Court err in equivocally responding to a juror's question that the substantial or large portion has no relation to what is alleged in the count in the indictment but it relates to the actual tax amount as filed and paid?

The Court of Appeals for the Fifth Circuit, without discussion, held this devoid of merit, although the indictment charged Defendant with attempting to "evade and defeat a large part of the income tax due and owing."

VI.

Did the District Court err in failing to grant a mistrial because of inflammatory and prejudicial remarks by the prosecuting Assistant United States Attorneys commenting that if the Defendant had any evidence available it would have been produced, and that he had every right to do it and his lawyer would have done it if it was available, and that the Petitioner could have called the Government Agent Brown because he was equally available—

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4. *Brady* v. *State of Maryland*, 373 U.S. 83 (1963).

5. The Sixth Amendment, U. S. Constitution provides, "In all criminal prosecutions the accused shall enjoy the right . . . to be confronted with the witnesses against him . . .".

do these comment upon the failure of Petitioner to testify or produce evidence in his behalf?

The Court of Appeals for the Fifth Circuit, without discussion, held this devoid of merit.

STATEMENT OF THE CASE

Petitioner in two counts was charged with personal income tax evasion on his and his former wife's returns and in two counts with causing to be evaded corporate income taxes. He was acquitted on one of the corporate counts involving principally a $50,000 item which Petitioner contended was a gift. Petitioner contends, inter alia, that since he was acquitted for causing the corporation to evade taxes for that year, a conviction cannot stand for personal income taxes based upon constructive dividends from the same corporation.

Principal complaints are the procedural errors in instructing the Jury without its request of either party after the Jury returned to pose certain questions, that a gift in the statutory sense is not necessarily a gift as that term is commonly used and understood.

The indictment charges an attempt to defeat and evade a large part of the tax due and owing. The juror asked the Court:

> "THE JUROR: The substantial or large portion you refer to has no relation to what is alleged in the count in the indictment? I mean it is not substantial as related to how much he is charged with in the count in the indictment, but it relates to the actual tax amount as filed and paid?
>
> "THE COURT: If you will read the indictment carefully, I think you will find that is true. It states that the Defendant undertook to evade a large part of the tax that was in fact due."

Said instruction was at least equivocal and misleading and harm must be presumed therefrom.

The jury then returned to its deliberations and returned a verdict of guilty as to both personal accounts of tax evasion and one count of evading corporate taxes.

Defendant was sentenced to five years to serve concurrently on the three counts. The Court of Appeals for the Fifth Circuit, per curiam, affirmed the judgment of the lower court on February 14, 1966, and denied a rehearing on March 15, 1966.

For the following reasons, Petitioner herewith files for a Writ of Certiorari to review the judgment and opinion below, to the end that Petitioner may have a new trial on remand to the District Court.

REASONS FOR GRANTING THE WRIT

In the instant case the Court of Appeals for the Fifth Circuit has held that a jury in a criminal tax evasion case can properly be instructed that a gift, as that term is used in the Tax Laws, is not necessarily a gift as that term is commonly used and understood. The Court has further approved a jury instruction in response to question that the substantial or large portion of the tax refers to the amounts actually filed and paid and not as to how much Petitioner is charged with in the indictment as being due and owing.

Further, approval has been given to commenting in argument in a case where Petitioner did not take the witness stand, that if he had any evidence available it would have been produced, that he had a right to do it and his lawyer would have done it if it was available. And that the investigating government agent was equally

available for Petitioner to call, when comment and argument was made upon the failure of the Government to call this investigating agent.

Further, it permits jurors to make notes of the evidence even after the same is called to the Court's attention.

It further approves admitting summaries of evidence which contain only the Government theories and conclusions of the Government Agent preparing same labeling income as diverted, and upon credibility, invade the jury's province and deny Petitioner confrontation.

These holdings, it is respectfully submitted, are either in direct conflict with or misinterpret the decisions or misapply the principles emanating from this Honorable Court. Several present for the first time to this Honorable Court questions important to the proper administration and adjudication of Federal Criminal Law.

I.

Misinterpretation of Supreme Court Decisions

Although no definition of gift was requested by either Petitioner or Respondent, nor the jury, the Court while answering questions propounded to it by the Jury, submitted the following verbatim from this Court's decision in *Commissioner of Internal Revenue* v. *Duberstein*, 363 U.S. 278 (1960):

> "Now, you inquire if the $50,000.00 item was a gift to the Defendant, would he have had to pay personal income tax on it or would the corporation have to pay tax on it.
>
> "If in fact it was a gift in the statutory sense, that is, if it was a gift as that term is used in tax laws, it would not be taxable either to the individual or to the corporation. But a gift, as that term is used

in the tax laws, is not necessarily a gift as that term is commonly used and understood.

"In considering whether this payment was or was not a gift for tax purposes, I give you this instruction as to what is or is not a gift, as the term is used in the tax statutes:

> 'A voluntarily executed transfer of his property by one to another, without any consideration or compensation therefor, though it might be a common law gift, is not necessarily a gift within the meaning of the tax statute. The mere absence of a legal or moral obligation to make such a payment does not establish that it is a gift. And, importantly, if the payment proceeds primarily from the constraining force of any moral or legal duty, or from the incentive of anticipated benefit of an economic nature, it is not a gift. And conversely, where the payment is in return for services rendered, it is irrelevant that the donor receives no economic benefit from it. A gift, in the statutory sense, proceeds from a detached and disinterested generosity, out of affection, respect, admiration, charity, or like impulses. The most critical consideration is the transferor's intention.'"

And again a juror asked the Court as follows:

"A JUROR: Could I ask a question, Your Honor?

"THE COURT: Yes?

"THE JUROR: The substantial or large portion you refer to has no relation to what is alleged in the count in the indictment? I mean it is not substantial as related to how much he is charged with in the count in the indictment, but it relates to the actual tax amount as filed and paid?

"THE COURT: If you will read the indictment carefully, I think you will find that is true. It states that the Defendant undertook to evade a large part of the tax that was in fact due."

The Court of Appeals interpreted *Duberstein* to mean that a gift in terms of tax law is not a gift in the common ordinary meaning which laymen understand.

II.

The Importance of the Questions Presented

Whether or not a juror in a criminal proceeding should be permitted to take notes during the trial and into the jury deliberation is a question which has caused considerable dissension in the Federal judiciary.

The voluntary charging of the jury in a criminal proceeding that a gift under the tax law is not really a gift and the equivocal answering of another inquiry that substantially relates to the actual tax amount as filed and paid and not that due and owing under the indictment are unprecedented criminal tax evasion proceedings.

Subtle encroachments upon delicate Constitutional privileges through jury comments upon the failure of the Defendant to produce evidence and witnesses on his behalf is to return to a system of inquisition, and a departure from our accusatorial one. Subtle also is the inroad permitted upon the heretofore Constitutionally protected right of confrontation of witnesses by the use of nameless, faceless summaries which cannot be cross-examined.

THEREFORE, it is the public interest, reconciled with the liberty of the individual, that this application presents.

CONCLUSION

For the foregoing reasons Petitioner Sam G. Myers prays that a Writ of Certiorari issue to the United States Court of Appeals for the Fifth Circuit, and that, after

due proceedings had, the judgment of that Court may be reviewed and reversed, to the end that Petitioner's indictment be remanded to the District Court for trial on its merits, all of which it is respectfully submitted.

Newton B. Schwartz

CERTIFICATE OF SERVICE

I certify that three copies hereof have been served upon the United States of America by mailing them in a duly stamped, properly addressed envelope this 8th day of April, 1966, to Woodrow Seals, United States Attorney, 515 Rush at Smith, Federal Building, Houston, Texas, and one copy upon the Solicitor General of the United States, Department of Justice, Washington, D. C.

NEWTON B. SCHWARTZ
Member of the Bar of the Supreme Court
310-317 West Building
Houston, Texas
Attorney for Petitioner

APPENDIX A

Judgment and Commitment (Rev. 7-52)

(Filed July 20, 1964)

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

United States of America
v.
SAM G. MYERS
} No. CR-64-H-53

On this 20th day of July, 1964 came the attorney for the government and the defendant appeared in person and[1] with counsel.

IT IS ADJUDGED that the defendant has been convicted upon his plea of[2] not guilty, and a verdict of guilty of the offense of wilfully and knowingly attempting to evade and defeat income taxes, in violation of Title 26, U. S. Code, Sec. 7201 as charged[3] in Counts 1, 2 and 4; and the

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1. Insert "by counsel" or "without counsel; the court advised the defendant of his right to counsel and asked him whether he desired to have counsel appointed by the court, and the defendant thereupon stated that he waived the right to the assistance of counsel."

2. Insert (1) "guilty," (2) "not guilty, and a verdict of guilty," (3) "not guilty, and a finding of guilty," or (4) "nolo contendere," as the case may be.

3. Insert "in count(s) number " if required.

court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted on Counts 1, 2 and 4, and not guilty on Count 3, as found by the Jury.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of[4] FIVE (5) YEARS on Counts 1, 2 and 4 jointly.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ Ben C. Connally,
United States District Judge.

The Court recommends commitment to:[6]

V. Bailey Thomas,
Clerk.

APPROVED: /s/ BSC.

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4. Enter (1) sentence or sentences, specifying counts if any; (2) whether sentences are to run concurrently or consecutively and, if consecutively, when each term is to begin with reference to termination of preceding term or to any other outstanding unserved sentence; (3) whether defendant is to be further imprisoned until payment of the fine or fine and costs, or until he is otherwise discharged as provided by law.

6. For use of Court wishing to recommend a particular institution.

APPENDIX B

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 21783

SAM G. MYERS,
Appellant,

versus

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the Southern District of Texas.

(February 14, 1966.)

Before JONES and BROWN, Circuit Judges, and DYER, District Judge.

PER CURIAM: Of the many procedural errors Appellant asserts to have occurred in his trial for tax evasion, only one has any semblance of merit or requires discussion: permitting the jury to use a summary of the evidence prepared by a Government agent who testified. Though the submission to the jury in tax evasion cases, where the facts are often voluminous and complicated, of summaries of the evidence (in either narrative or tabular form) has often been approved, *Ballantyne v. United*

States, 5 Cir., 1961, 293 F.2d 112, 116, rehearing denied, 294 F.2d 958, cert. denied, 1962, 369 U.S. 802, 82 S.Ct. 641, 7 L.Ed.2d 549; *Conford v. United States*, 10 Cir., 1964, 336 F.2d 285; *Swallow v. United States*, 10 Cir., 1962, 307 F.2d 81; *Turner v. United States*, 4 Cir., 1955, 222 F.2d 926, cert. denied, 350 U.S. 831, 76 S.Ct. 65, 100 L.Ed. 742; *United States v. Kelley*, 2 Cir., 1939, 105 F.2d 912; see 10 Mertens, Federal Income Taxation §55A.22, at 142 (rev. ed. 1964), their preparation and use must be carefully handled by the trial Judge. Having carefully examined the complained of summary, the evidence it purports to cover, and the Court's instructions accompanying its submission to the jury, we find no impropriety in either the preparation or use here.

Although the summary does not include all the evidence, or Appellant's theories of the evidence, it does not purport to. See *Flemister v. United States*, 5 Cir., 1958, 260 F.2d 513. It does not contain anything not in the record, *United States v. Ward*, 3 Cir., 1948, 169 F.2d 460, and identifies in detail the evidence summarized, *Lloyd v. United States*, 5 Cir., 1955, 226 F.2d 9. Finally, in view of its contents and the Judge's instructions regarding its use, this summary did not usurp the province of the jury. *Steele v. United States*, 5 Cir., 1955, 222 F.2d 628.

All other contentions are devoid of merit.

AFFIRMED.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE
FIFTH CIRCUIT

October Term, 1965

No. 21783

D .C. Docket No. 64-H-53-Criminal

SAM G. MYERS,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Southern District of Texas.

Before JONES and BROWN, Circuit Judges, and DYER, District Judge.

Judgment

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

February 14, 1966

Issued as Mandate:

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 21783

SAM G. MYERS,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court
for the Southern District of Texas.

(Filed March 15, 1966)

On Petition for Rehearing

Before JONES and Brown, Circuit Judges, and DYER, District Judge

PER CURIAM:

It is ORDERED that the Petition for Rehearing filed in the above entitled and numbered cause be, and the same is, hereby DENIED.